Nos. 20 and 22

In the Supreme Court of the United States

OCTOBER TERM, 1943

STATE OF CALIFORNIA AND BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR, APPELLANTS

v.

THE UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION, ET AL.

CITY OF OAKLAND, APPELLANT

v.

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BRIEF FOR THE UNITED STATES AND THE UNITED STATES MARITIME COMMISSION

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OPINIONS BELOW

The opinion of the specially constituted district court (R. I, 82–92)* is reported in 46 F. Supp. 474. The opinion of the Maritime Commission (R. I, 13–43) is reported in 2 U. S. M. C. 588.

*The roman numeral refers to the volume, the arabic to the page.

JURISDICTION

The final decree of the district court was entered on December 1, 1942 (R. I, 108). The petition for appeal was filed and allowed on December 31, 1942, in No. 20 (R. I, 111, 115), and on January 28, 1943, in No. 22 (R. I, 119–121, 124). This Court noted probable jurisdiction on April 12, 1943 (R. II, 1327–1328). The jurisdiction of this Court is invoked under Section 31 of the Shipping Act of 1916 (39 Stat. 738; 46 U. S. C. 830), the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. C. 47, 47a), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. C. 345).[1]

STATUTES INVOLVED

The relevant portions of the Shipping Act of 1916 (39 Stat. 728; 46 U. S. C. 801 *et seq.*) are set forth in the Appendix, *infra,* pp. 78–84.

QUESTIONS PRESENTED

1. Are the wharf operations of San Francisco and Oakland harbors, conducted respectively by a State agency and a municipal agency, beyond the regulatory power of Congress when those operations are in the flow of interstate and foreign commerce?[2]

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[1] In *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, this Court entertained an appeal from a district court based on these provisions.

[2] In the district court appellants also urged a constitutional argument based on Art. I, Sec. 9, cl. 6, of the Constitution, forbidding preferences to "Ports of one State over those of

2. Does their status as State agencies remove the Board of State Harbor Commissioners for San Francisco Harbor and the Board of Port Commissioners of the City of Oakland from the statutory jurisdiction conferred on the Maritime Commission by the Shipping Act of 1916, because of the absence of specific reference to State agencies in the definition of the scope of its coverage?

3. Do appellants operate their wharves as a "business," "in connection with a common carrier by water" within the meaning of the Shipping Act of 1916?

4. Is the power to regulate free time practices and wharf demurrage and storage charges conferred on the Maritime Commission by the Shipping Act of 1916?

5. Do the findings of the Maritime Commission support its order?

6. Does the evidence support the findings?

7. Is the order of the Maritime Commission valid in so far as it compels the City of Oakland to submit agreements respecting wharf leases to it for approval?

STATEMENT

These cases are appeals from decisions sustaining an order issued, after investigation and public hearing, by the United States Maritime Commission (the "Commission"), acting under the

another." This point, decided against appellants in the district court (R. I, 92), has been abandoned in their briefs here.

provisions of the Shipping Act of 1916 (the "Act"), 39 Stat. 728, 46 U. S. C. §§ 801, *et seq.* The parts of the order in question establish maximum free time periods and minimum wharf demurrage and storage charges for all waterfront terminals, including appellants', operated in the San Francisco Bay area and direct appellant City of Oakland to file certain agreements with the Commission for its approval (R. I, 39–41).

THE APPELLANTS

Appellant State of California ("California") owns all piers and their adjunctive terminal facilities along the "commercial waterfront" in the Port of San Francisco, operating them through the Board of State Harbor Commissioners for San Francisco Harbor (the "Board"), a statutory public body charged with the general duty of providing facilities for the handling of freight and passenger traffic on the San Francisco waterfront (R. I, 140–141).[3] By statute the Board is forbidden to collect greater revenue than that needed to enable it to perform its duties of supervising the work and affairs of the Harbor and constructing the required facilities (R. I, 489–490). See California Harbors and Navigation Code, §§ 3080, 3084.

Most of its pier and terminal space is "as-

[3] See California Harbors and Navigation Code, § 1700.

signed" by the Board, subject to cancellation on thirty days' notice, to various steamship companies (R. I, 141). Office space on two of the piers, 45 and 56, respectively, is assigned to two concerns engaged in the terminal business, Golden Gate Terminal Company and State Terminal Company, Ltd. (R. I, 142, 153), which use the facilities on the piers they occupy in the performance of their terminal services, subject, however, to the Board's control and supervision (R. I, 142–143, 594–597). A section of another terminal is rented to the Islais Creek Grain Terminal Corporation, which apparently handles grain products exclusively (R. I, 144–145).

All the assignees pay the Board a rental, the operators of terminals for office space only (R. I, 141–143, 165), and turn over to it all "dockage," "toll," and "demurrage" or "storage" charges,[4] which are collected at rates established by the Board and published in its tariff (R. I, 141–142, 143–144, 148, 164–165). The assignees retain any charges they receive for various other "terminal" services they perform for shippers, con-

[4] The "dockage" charges are assessed against vessels for the privilege of docking at wharf; the "toll" charges against cargo for the privilege of transportation over or through terminal, or being loaded or discharged at terminal; and "demurrage" or "storage" charges against cargo for using the terminal facilities beyond the "free time" allowed for the assembling of cargo upon, or its removal from, the wharves (R. I, 18, 26).

signees or vessels (R. I, 143, 165).[5] Employees of the assignees perform all of the work and services involved in the receiving, loading, unloading and handling of cargo at the Board's piers (R. I, 475–477, 496). However, the Board does employ a staff of men, under the direction of a Chief Wharfinger, whose duty it is to note and record all cargo and vessel movements at all of the terminals, and to assess and collect the charges due to the Board (R. I, 147–148, 475–476).

The Board fixes the "free time" periods allowed at the facilities for the assembly of removal of cargo, and reserves the right to terminate paid storage of goods and remove them at the expense of the owner (R. I, 148; Ex. 64, R. II, 1083). Most of the goods handled at the State's facilities are transported to or from ports outside the State (cf. R. I, 589).

Appellant City of Oakland ("Oakland"), through its Board of Port Commissioners, directly operates several piers and terminals in the harbor of Oakland (R. I, 170). The city establishes the charges for all services, and fixes the free time periods at these facilities (R. I, 170, 171, 379–

[5] E. g., arranging for vessel berth, space for cargo, checking cargo to or from vessel, receiving or delivering cargo, preparing manifests and other reports, such as "over," "short," damage, etc., weighing, taring, labeling, stropping, stencilling, scraping and remarking, consolidation of car pool shipments, and handling of rolls of boxboard (Ex. 60, R. I, 790, 798–799).

380). In addition, the city leases or assigns some of its facilities to private interests. One of its lessees is Howard Terminal, which is required by the lease to pay "tolls" wharfage and dockage [to the city] at the rates charged by the City of Oakland at its other municipally owned wharves". (R. I 170, 171.) One pier is "assigned" to McCormick Steamship Company, under an agreement specifying that the latter shall not compete for business which the city can handle (R. I, 171–173). The city also leases some of its facilities to "private lumber terminal operators" (R. I, 170).

THE PROCEEDINGS BEFORE THE COMMISSION

The administrative proceedings were begun by the Commission's order of investigation, entered upon its own motion, on November 19, 1939, to determine among other things whether terminal operators in the San Francisco Bay area were violating Sections 15, 16, and 17 of the Act[6] (R. I, 125–127).

The order of investigation, as amended, named twenty-two respondents, including California, the Board, and Oakland (R. I, 127–129); the investigation was primarily concerned with the following terminal operators, comprising the principal competitors in the area: appellants, California's private terminal assignees (Golden Gate

[6] For text, see Appendix, *infra*, pp. 79–82.

Terminals and State Terminal Company, Ltd.), the three principal private operators in the Bay area, namely, Parr-Richmond Terminal Corporation, Howard Terminal and Encinal Terminals, and the Stockton Port District, operating public facilities some 80 miles inland from the Bay but nonetheless competitive with the Bay terminals (R. I, 17, 737; Ex. 64, R. II, 878).

Evidence was received at public hearings held in two stages: the first from February 13 to 21, 1940, and the second from October 7 to 9, 1940 (R. I, 134–740). So far as relevant here the evidence concerned the practices of the terminals with respect to free time periods and wharf demurrage and storage charges. The principal witness on these matters was T. G. Differding, an expert with twenty-one years of experience in traffic and transportation matters,[1] who was called by the Commission (R. I, 237–238, 241). Mr. Differding's qualifications included a term of employment by the California Railroad Commission to assist Dr. Ford K. Edwards, its transportation economist, in "an investigation and development

[1] His background included one and one-half years as traffic manager for the Parr-Richmond Terminal Corporation, a term of five months as secretary of the Marine Terminal Association of Central California, whose membership included the private terminal operators named as respondents by the Commission in this proceeding, and three and one-half years as traffic manager for the Oakland Chamber of Commerce (R. I, 238).

of cost studies on the operation of public utility wharfingers on San Francisco Bay for rate-making purposes and the establishment of rules, regulations and practices in connection therewith"—to which Mr. Differding devoted his time almost exclusively for the year of 1935 (R. I, 238–239).

This investigation had resulted in two reports, "preliminary" and "final," submitted by Messrs. Edwards and Differding to the California Railroad Commission;[8] and these reports were admitted as evidence in the instant proceeding as Exhibits 60 and 61, Mr. Differding explaining their contents and being available for cross-examination in connection therewith (R. I, 239, 242, 245–255, 261–266, 267–274). These reports set out in detail the procedure followed in the "Edwards-Differding" study, and set out the bases for the authors' general conclusions that the free time periods allowed by the terminals were too long, and that the charges they made for their various services, including wharf demurrage and storage, were far below cost (R. I, 244–245, 253, 247–252, 253–255; Ex. 60, R. I, 793–798; Ex. 62, R. II, 908–952).

[8] On the basis of these reports, the Railroad Commission issued a recommendation in conformance therewith. It did not order compliance because the publicly owned terminals were beyond the jurisdiction conferred on it by State law and to have ordered compliance by the private terminals alone would have ruined the latter. In some respects not herein involved, all the terminals voluntarily complied with the recommendation. (R. I, 17–18, 85, 262–263.)

While the study was made in 1935, Mr. Differding testified that "so far as wharf demurrage is concerned and free time, there have been no changes generally speaking at all" (R. I, 262); and also "that all of the major elements of costs entering into the providing of [demurrage] service have very materially increased since 1935,"[9] so that "if, as we stated * * *, the wharf demurrage rate structure was absurd in 1935, then under existing conditions it falls far short of approaching a compensatory basis" (R. I, 248).

As to free time, Mr. Differding's oral and documentary testimony, along with other evidence of record, established that the San Francisco Bay terminals had originally permitted only three to five days' free time but "under the pressure of competition" had increased the allowance to ten days and more;[10] that except at California's steamship-assigned terminals, the general practice was to extend the free time period on outbound cargo for such indeterminate additional time as might

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[9] Other witnesses confirmed Mr. Differding's testimony that no substantial changes had occurred in free time allowances or wharf demurrage charges since 1935, although costs had risen materially. See, e. g., R. I, 275–276, 513–514, 517, 526, 529.

[10] Appellant California allowed shorter periods, 5 or 7 days, on certain kinds of traffic at its steamship-assigned terminals, but at the piers assigned to Golden Gate and State terminals, it generally permitted 10 days as the basic allowance on all types of traffic (see R. I, 453–456).

be necessary to cover delays in vessel sailings, and that in cases of such delays appellant Oakland allowed whatever additional free time was "warranted and equitable" in each case in the judgment of its port manager; that the free time periods allowed at other Pacific Coast ports were generally shorter than at San Francisco, and that terminal operators in northwest Pacific ports allowed no extensions to cover delays in vessel sailings, since such delays were not the fault of the terminals; that most of the terminal operators in the San Francisco Bay area agreed that existing free time periods were too long and that in the long run the wastage of valuable facilities incident to excessive free time allowances cast a burden on the users of other terminal services, in the form of higher charges (R. I, 244–245, 253; Ex. 60, R. I, 797–798).

Edwards and Differding criticized excessive free time periods in these terms (Ex. 60, R. I, 797):

> If [the free time] is too long, it constitutes an uneconomic use of valuable space for which the average shipper can ill afford to pay, whether in the form of a higher toll charge or a wharf demurrage charge.
>
> In the long run every additional day's time adds to the terminal costs and eventually this cost is passed on to the consumer of the service. If the requirements of certain shippers or certain cargoes demand that

the goods remain for extended periods on the wharves, it appears as only reasonable that those enjoying this additional service should be the ones to pay for it.

In their final report, Edwards and Differding expressed the conclusion that the free time periods granted by the San Francisco Bay terminals were generally too long and set out their recommendations regarding a reasonable schedule of free time allowances (Ex. 61, R. II, 908–911).

As to demurrage and storage charges, which are assessed against cargo left beyond the free time period, the evidence dealt largely with the sufficiency of the charges to meet the cost of rendering the service involved. The heart of the record in this connection was the aforementioned Edwards-Differding study, which included an exhaustively detailed analysis of the charges for, and cost of, rendering demurrage and storage services at the principal privately operated terminals in the Bay area. (R. I, 247–255; Ex. 61, R. II, 872, 911–925, 957.) In general, this revealed that although wharf demurrage was originally a penalty charge to force goods off the dock within the time reasonably necessary to remove them, "under the influence of competition, the wharf demurrage rates have been so reduced and the rules and practices so liberalized that it is difficult to distinguish between demurrage services on the one hand and warehouse storage services on the other" (Ex-

60, R. I, 793);[11] and that a minimum increase of 33 per cent in the existing charges was required to attain a compensatory level (R. I, 248–249, 716; Ex. 61, R. II, 912). Mr. Differding testified that noncompensatory storage charges cast a burden "upon the other users of the facilities, which in this case means the vessels and those shippers who

[11] The study did not include the charges made by the public agencies, because the latter were considered beyond the statutory jurisdiction of the California Railroad Commission (R. I, 263–264; Ex. 60, R. I, 771). As to these, the record shows that the charges fixed by appellant Oakland, and by appellant California at piers 45 and 56, assigned to Golden Gate and State Terminal, are competitive with those in effect at the terminals covered by the Edwards-Differding study (R. I, 454–455). A different situation prevails at the piers assigned by California to the steamship companies. At these piers "one of the rates * * * is rather a penalty rate for the purpose of forcing cargo off the piers" (R. I, 150), amounting to 25 cents per ton for the first five days and 50 cents per ton for succeeding five-day periods (R. I, 451–452). However, there is also in force at these piers a so-called bulkhead storage" rate, granted "at the discretion of the chief wharfinger," of 12½ cents per ton for each seven days or part thereof (R. I, 265, 310, 444–446; Ex. 64a, R. II, 1083). The "bulkhead" rate, which is at the same approximate level as the demurrage and storage rates at the other terminals (see Ex. 117, R. II, 1218A), may be granted by the chief wharfinger, "when space is available and the prompt loading and discharging of a vessel will in no manner be interfered with" (R. I, 444–445, 495). There was testimony that there is generally no difference between the methods of handling cargo charged at the "demurrage" rate and that charged at the "bulkhead storage" rate, and that both types of cargo are intermingled on the piers (R. I, 270–271).

have transit cargo and do not take advantage of the wharf demurrage space" (R. I, 717).

In more detail, the Edwards-Differding study covered all phases of the operations of Howard, Encinal, and Parr-Richmond, and included Golden Gate and State Terminal except as to wharf demurrage and storage, and was based upon visual inspection of the terminals' physical property as well as examination of their records (R. I, 238–239, 246–247; Ex. 60, R. I, 820–846; Ex. 62, R. II, 950–951). An exhaustive analysis was made of each of the numerous items comprising the costs of the terminals, including labor, overhead and physical plant and equipment, service lives being calculated in determining costs of physical property; and each item of cost was painstakingly allocated among each of the various terminal services, according to the facilities employed in their performance (Ex. 61, R. II, 925–962). In particular, with reference to wharf demurrage and storage, floor space costs per square foot per month were determined and then translated into costs per ton for the principal commodities handled, for which space requirements differ according to variations in their density and bulk (R. I, 249–250; Ex. 61, R. II, 912–914, 915–917); and labor and overhead costs incidental to wharf storage and demurrage were determined, likewise on a thirty-day basis, both for "high-piling" and for the less

costly normal piling (R. I, 250–252; Ex. 61, R. II, 914–915, 917–920). On the basis of this analysis, a formula was developed for the determination of terminal costs, service by service (Ex. 61, R. II, 925–962). To deal with the basic problem of inadequate revenues, a schedule of charges was recommended which was designed to increase the existing rates by 33 percent, the minimum necessary to make the "charges compensatory under the most favorable conditions" (Ex. 61, R. II, 912, 920–920A, 925). The schedule was founded on three basic factors: (i) costs, based on the cheapest method of piling the various kinds of cargo, and on the lowest combination of handling floor space costs found among the terminals studied; (ii) the ability of consumers to pay; and (iii) competitive conditions (R. I, 246, 249–250, 252; Ex. 61, R. II, 876–878, 917, 920, 924–925).

For the purpose of the present proceeding, Mr. Differding prepared a formula for determining unit costs of wharf demurrage, patterned after that developed in their 1935 study (R. I, 256, 258–259; Ex. 63, R. II, 1044–1062). And the Commission requested the principal terminals except Parr-Richmond, whose operations were not considered representative (R. I, 711, 735–736), to prepare analyses of their demurrage and storage costs, according to this formula, for submission in evidence (R. I, 533–535). Howard, the Port District of Stockton,

and Encinal complied (R. I, 538, 540, 542),[12] but appellants did not, on the ground that their accounting methods precluded application of the formula (R. I, 569, 580). The cost analyses thus submitted[13] revealed the following data as to demurrage and storage revenues and costs at Encinal, Howard and Stockton (R. I, 30):

	Encinal year ended Oct. 31, 1939	Howard year ended Oct. 31, 1939	Stockton year ended June 30, 1940
Revenue	$24,289.35	$31,359.46	$15,935.80
Expense	59,572.98	45,033.49	34,441.72
Loss on basis of existing rates	35,283.63	13,674.03	18,505.92
Average monthly revenues per ton, all commodities	.312	.426	.645
Unit costs:			
Fixed cost per ton, excluding high piling	.336	.489	.972
High piling	.690	.372	.184
Variable costs:			
Overhead per ton per 30 days	.145	.153	.204
Floor space cost per square foot per 30 days	.057	.031	.077

Instead of the cost analysis, Oakland submitted general data covering the income and expense of its terminal operations for the year 1940 (R. I, 536–537, 563–565; Exs. 126, 126A, 126B, 127, 128, R. II, 1219–1242; Ex. 165, R. II, 1308). This disclosed an over-all loss,[14] and an average monthly

[12] Howard—Ex. 130, R. II, 1243–1253; Encinal—Ex. 140, R. II, 1292–1300; Port of Stockton—Ex. 137, R. II, 1281–1291.

[13] See footnote 12, *supra*.

[14] It showed a net income of $78,950.67, excluding loss from airport operations and interest on bonds paid by the city in that year. The inclusion of the interest paid, other than that

demurrage revenue per ton on all commodities of 24.5¢ per ton (R. I, 31; Ex. 126, R. II, 1223; Ex. 165, R. II, 1308). California submitted income and expense statements and other data covering its complete terminal operations during the fiscal years ending June 30, 1939 and 1940 (R. I, 539–540; Ex. 135, R. II, 1255–1278). These showed an overall net income designated as "Surplus to accumulated excess income for replacement of facilities and retirement of bonds," amounting to $161,416.89 [15] for 1939, and $283,942.16 for 1940 (Ex. 135, R. II, 1258) prior to sinking fund payments for redemption of bonds, amounting to $345,939.33 in each year (R. I, 583, 585–586), and without any deduction for depreciation on depreciable terminal facilities (R. I, 581–582),[16] consisting of buildings, structures and equipment, with a recorded value of $57,637,949.12 as of June 30, 1940 (Ex. 135, R. II, 1257). In addition, California submitted data disclosing an average monthly demurrage revenue per

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assignable to the city's municipal airport, revealed a loss of $95,859.33 on the terminal operations. (R. I, 32; Ex. 126, R. II, 1222.)

[15] All of the figures which follow are after elimination of items pertaining to the operations of the Belt Railroad, which the State maintains in conjunction with its pier and terminal facilities in San Francisco harbor (R. I, 140), and on which a substantial operating loss was incurred in both years (Ex. 135, R. II, 1258).

[16] No depreciation on this property has been determined or provided for since 1929 (R. I, 581).

ton, on all commodities, of 30.9¢ at piers 45 and 56 in the year 1940 (Ex. 135, R. II, 1259, 1278A).

THE COMMISSION'S DETERMINATIONS

On September 11, 1941, after exceptions had been filed to the report and recommendations of the trial examiner, and oral argument heard thereon, the Commission issued its report, findings of facts, and order (R. I, 13, 16-45).

In connection with free time, the Commission concluded that the regulations and practices of the terminals were unduly preferential and prejudicial in violation of Section 16, and unreasonable in violation of Section 17, insofar as indefinite free time was granted to cover delays in vessel sailings and to the extent that excessive time was provided by the regular allowances (R. I, 40). This conclusion was based on the findings that the practice of granting indeterminate extension affords opportunity for discrimination between shippers; and that the granting of excessive allowances involves costs the recoupment of which casts a burden upon nonusers of the excess time, and, further, prefers users of the excessive free time by affording them more service than nonusers obtain (R. I, 23–24). The regular free time allowances granted by the terminals were found excessive to the extent that they exceeded the following schedule of maximum periods, corresponding substantially to the Edwards-Differ-

ding recommendation, which the Commission ordered enforced as "reasonable and proper" (R. I, 25–26): [17]

	In-bound days	Out-bound days
Coastwise and Inland Waterway	5	5
Intercoastal	5	7
Foreign	7	7
Transshipment	10	10

In connection with wharf demurrage and storage, the Commission also held the terminals, including appellants, were engaged in preferential and unreasonable practices, violative of Sections 16 and 17 of the Act, in that they maintained noncompensatory charges for such services (R. I, 40–41). This conclusion was reached on supporting grounds akin to those underlying the condemnation of excessive free-time allowances. Stressing the results shown by the unit cost studies of record (R. I, 30–31) and the more general data submitted by appellants (R. I, 31),[18] the Commission found the rates in question yielded revenues "far below the cost of the service" (R. I, 29), with the result that users of wharf storage failed to

[17] A specific exception allowed 21 days for off-shore shipments of packaged oil, and the Commission generally authorized the terminals to make reasonable rules in connection with the schedule, making express reference in this connection to the matter of delays in vessel sailings (R. I, 26).

[18] See pp. 16–17, *supra*.

provide their share of "essential terminal revenues," while a disproportionate share of the burden was cast upon users of other services, for which more reasonable rates were in effect (R. I, 32, 40–41). It accordingly prescribed "as a reasonable practice," a schedule of minimum charges for wharf demurrage and storage consisting of the rates recommended by Edwards and Differding on the basis of their 1935 study (R. I, 35–36, 37–38). It admitted that these charges were "too low," but adopted them because the evidence as to increased costs since 1935 was too general to justify an attempt "to fix compensatory charges on individual commodities" and because this schedule would at least "(1) * * * bring about uniformity on a minimum basis * * * not in excess of the cost of the service to any of the respondents, (2) * * * remove many of the abuses disclosed by the record, and (3) * * * provide a standard from which departures can be made on individual commodities as they appear to be justified by further proof" (R. I, 36, 38).

The Commission also held that Oakland's leases to Howard and McCormick Steamship Company were subject to Section 15 of the Act and therefore required to be submitted for its approval (R. I, 19).

The Commission overruled the objection of appellants California and Oakland that they were not subject to its jurisdiction (R. I, 18–19).

PROCEEDINGS IN THE COURT BELOW

The appellants instituted separate suits in the District Court of the United States for the Northern District of California, to set aside the Commission's order insofar as it applied to them (R. I, 1, 51).

The petitions alleged, *inter alia,* that appellants were not subject to the Commission's jurisdiction; that the Commission's order was based on arbitrary determinations; that there was no evidence to support the Commission's determination and order as to the appellants; that the order exceeded the Commission's statutory authority over "other person(s) subject to this Act"; and that the order violated Article I, § 9, clause 6 of the Constitution prohibiting the preference of the ports of one State over those of another (R. I, 7–10, 56–59).

A three-judge court was convened, the two cases were consolidated, and after a hearing an interlocutory injunction was issued (R. I, 63–66). Answers to the petitions, denying the aforementioned allegations, were then filed by the United States (R. I, 66–73). Final hearings were held on February 26 and May 21, 1942 (R. I, 79–81), and thereafter, on August 20, 1942, the court filed an opinion sustaining the order of the Commission (R. I, 82–92). The court held that, irrespective of their status as public bodies, appellants were constitutionally subject to the federal

commerce power and, as "other person(s) subject to this Act," to the Commission's jurisdiction under the Shipping Act of 1916 (R. I, 86). Appellants' argument that they were not covered by the Act because the definition of "person" in Section 1 did not expressly "include" States or their subdivisions was rejected (R. I, 87–88). The court sustained the Commission's determinations regarding the unlawfulness of appellants' practices in connection with free time and in maintaining non-compensatory demurrage and storage charges—ruling that these matters and the order issued with respect thereto were within the scope of the Commission's broad authority under Sections 16 and 17 of the Act to deal with preferential or unreasonable practices on the part of any persons subject to the Act, notwithstanding that the Act did not authorize the Commission to regulate wharfinger rates as such (R. I, 89–91). The contention that the evidence was insufficient to justify the Commission's determinations and order with respect to the appellants was overruled, as was the argument that the order violated the constitutional prohibition against preferring the ports of one State over those of another (R. I, 91–92).

On December 1, 1942, the court entered final decrees dissolving the interlocutory injunction, denying the prayers for a permanent injunction, and dismissing the petitions (R. I, 108–110).

SUMMARY OF ARGUMENT

1. Congress is empowered to regulate State agencies in their operation of wharves used in the transfer and transshipment of goods in interstate and foreign commerce. Such wharves perform vital functions in the flow of commerce, clearly within the federal commerce power. As the States do not possess authority to withdraw interstate commerce from federal control the federal power extends to State agencies operating such wharves. *United States* v. *California*, 297 U. S. 175, is controlling.

2. In addition to regulating common carriers by water, the Act regulates as "other person(s) subject to this Act" those who operate wharves "in connection with a common carrier by water." While State agencies are not specifically included within the definition of "person(s)," the definition does not purport to be an exclusive one and therefore State agencies are not specifically excluded. States and their agencies have been held by this Court to be subject to other federal legislation although they were not specifically dealt with. The legislative history of the Act contains express evidence of the Congressional purpose to subject State and city operated wharves to the Act, and thus removes the scope of the Act from the realm of speculation.

Nor are appellants exempted on the ground that their facilities are not used "in connection with a

common carrier by water." This language, doubtless inserted to exempt terminals operated solely for rail and other land carriers, does not have the limiting meaning appellants search for, as the legislative history shows.

3. Section 16, forbidding water carriers and "other person(s) subject to this Act" to give unreasonable preferences, and Section 17, authorizing the Commission to regulate "practices" relating to "storing * * * of property," empower the Commission to deal with practices regarding free time and demurrage and storage charges which throw a burden on users of other terminal services.

This position is not challenged as to free time, though the order in that respect is attacked as unsupported by evidence. However, substantial evidence supports the order prescribing maximum free time periods, including an earlier report and recommendation of the California Railroad Commission which was rendered abortive by the refusal of the appellants, who were exempt from Railroad Commission orders, to acquiesce.

Appellants' contention that power to establish minimum storage charges is denied by the specific reference to rate fixing in other provisions dealing with water carriers, is untenable. Based as it is on inference, it must give way to a construction which is sanctioned by the language of the grant of power, the legislative history, prior decisions of

this Court, and the assumption that Congress intended the Act to be an effective instrument. The Act grants power to prescribe "regulations and practices" relating to "the receiving, handling, storing * * * of property;" this language is broad and would normally encompass a variety of specifics, including the power to prescribe what practices shall be pursued regarding charges for use of wharf space for storage. The legislative history shows that Congress had this meaning in mind, for at the committee hearings opposition developed to the draft bill which included ferry, towing and transfer operators in "other person(s) subject to this Act;" the ensuing discussion developed that the provision here in question would empower the Commission to regulate rate practices of such operators if the existing rates were unjust or unreasonable; the bill was amended to remove such operators from the definition of "other person." Moreover, in a statutory setting which would as well have supported the argument made here by appellants as does the Shipping Act, this Court construed a comparable provision in the Interstate Commerce Act as authorizing the Interstate Commerce Commission to condemn the charging of non-compensatory storage rates, which, as do those here, threw a burden on non-users of the storage service (*B. & O. R. Co.* v. *United States*, 305 U. S. 507). Also, in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, this Court

construed Section 16, which prohibits preferences by "other person(s)" as well as water carriers, as prohibiting the charging of discriminatory rates and upheld a Commission order forbidding the continuation of such rates; it is unrealistic to assert that having proscribed discriminatory storage rates Congress denied the Commission the power to enforce the prohibition by order and, instead bestowed on the Commission only that power to deal with them which is possessed by every citizen—namely, the power to inform the grand jury. Finally, it is reasonable to assume that Congress intended the Commission's power to regulate "practices relating to * * * storing * * * property" to be effective, and, as experience under the Act has shown, the power to regulate free time practices is ineffective unless practices regarding storage charges also are regulated. The two are inseparable aspects of one problem—storage practices—which must be dealt with as one problem. The language of the statute, which would empower the Commission so to deal with the problem, should therefore be given its normal meaning so that the Act may have a sensible and effective construction.

The Commission's findings, that the existing storage charges were non-compensatory and therefore discriminated against those unable to use the surplus storage services and placed a burden on users of other services, fully support

the order. This conclusion follows from *B. & O. R. Co.* v. *United States*, 305 U. S. 507, and other cases upholding similar orders under the cognate Interstate Commerce Act. The order here is not invalid because, unlike the order in the *B. & O.* case, it prescribes the rate which will be deemed compensatory and hence non-discriminatory. The order merely advises the terminals in advance of what will be required of them; it is thus at least as valid as a vague order merely prohibiting the discriminatory practice and leaving each terminal to proceed at its peril in ascertaining what practices would be lawful.

The evidence adequately supports the findings. Unit cost studies developed by experts for other terminals in the same area showed that the existing storage and demurrage charges were not compensatory. The general data submitted by appellants in lieu of the detailed cost information requested showed that they operated at substantial deficits and had recently nearly doubled certain other charges; consequently it was not persuasive that a different situation prevailed as to them.

4. Section 15 clearly authorizes the Commission's action regarding Oakland's leases. Any conflict or embarrassment resulting to the city government is the consequence of a federated system of government in which the cities are subject to the federal commerce power if they engage in interstate or foreign commerce.

ARGUMENT

I

UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION APPELLANTS ARE SUBJECT TO THE EXERCISE OF FEDERAL JURISDICTION OVER THEIR OPERATION OF WHARF AND TERMINAL FACILITIES

The question of appellants' amenability to the Commission's jurisdiction raises no serious constitutional issues. The federal commerce power easily reaches appellants' operation of their wharf and terminal facilities. Providing the means "of the transfer of traffic between the rail and the water carriers" (*Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 634), and handling both foreign and interstate traffic, such facilities are "necessary factors" in the flow of the nation's domestic and foreign commerce and thus clearly constitute "an interstate commerce agency," subject to the federal commerce power.[19] Cf. *Stafford* v. *Wallace*, 258 U. S. 495, 516–517; *Ex parte Easton*, 95 U. S. 68, 73, 75; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 520, *et seq.*; see also *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331. Nor does ap-

[19] It is not disputed that appellants' facilities handle interstate and foreign traffic, but appellant State of California argues that its terminal operations nevertheless do not constitute interstate commerce, relying upon cases sustaining State power over ferries and wharves where Congress had not acted. Such cases have no bearing on the power of Congress to act. See *United States* v. *Darby*, 312 U. S. 100, 119.

pellants' public character carry constitutional immunity from the Commission's jurisdiction. The States do not possess authority to withdraw, by any means whatsoever, interstate commerce matters from federal regulation. See *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 333, 344–346. Therefore, State or local governments which engage in any activity regulable under the federal commerce power are no less subject than private persons to the exercise of that power, whatever the capacity—"sovereign" or "private"—in which the activity is conducted. *United States* v. *California*, 297 U. S. 175; cf. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450. As this Court declared in *United States* v. *California, supra* (297 U. S. at 183, 184, 185):

> * * * we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity * * *. The sovereign power of the state is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * *
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> * * * * * * *
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> * * * The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Thus the propriety of the Commission's assertion of jurisdiction over appellants in the cases at bar depends entirely upon whether the exercise

of such jurisdiction is authorized by the Shipping Act of 1916.

II

THE SHIPPING ACT OF 1916 AUTHORIZES REGULATION OF APPELLANTS AS "OTHER PERSON(S) SUBJECT TO THIS ACT"

A. Public bodies are not excluded by the Act's Definition of "other person(s) subject to this Act."

In general, the Shipping Act of 1916 provides for regulation of two classes of persons: (1) "common carrier(s) by water" in interstate or foreign commerce, and (2) "other person(s) subject to this Act."[20] 39 Stat. 728, 46 U. S. C. § 801, *et seq.* The Act (Sec. 1, 46 U. S. C. 801, Appendix, *infra*, pp. 78–79) defines the latter term to mean "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, ware-

[20] As originally enacted (39 Stat. 729), the Shipping Act of 1916 created and was administered by the United States Shipping Board. By Executive Order June 10, 1933, No. 6166, Sec. 12 (set out in note to 5 U. S. C. 132), the Board was abolished and its functions were transferred to the Department of Commerce. By Act of June 29, 1936 (49 Stat. 1987; 46 U. S. C. 1111) the United States Maritime Commission was created and the administration of the Act transferred to it. The Act of September 18, 1940 (54 Stat. 929; 49 U. S. C. 901–923; Part III, Interstate Commerce Act), which provided generally for the regulation by the Interstate Commerce Commission of carriers by water between ports in the United States, repealed all provisions of the Shipping Act inconsistent with it. However, it specifically (49 U. S. C. 920 (b) (3)) did not repeal the provisions regarding regulation of "other persons(s) subject to this Act."

house, or other terminal facilities in connection with a common carrier by water," and provides that "'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country." The pertinent classification here, of course, is "other person(s) subject to this Act," who are expressly referred to in the provisions of Sections 16 and 17 of the Act (Appendix, *infra*, pp. 81–82), under which the Commission issued the order assailed in the cases at bar.

Appellants argue that they are not covered by the word "person" as defined in the Act, because there is no express declaration that person "includes" States and their subdivisions.[21] But the word "includes", which may be used in a limiting sense as the equivalent of "means", is more commonly used in an illustrative sense, equivalent to "comprehends" or "embraces". Cf. *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 125. And the language at hand suggests that "includes" was here used in the broader, less restrictive, sense of "com-

[21] California made the same contention without success in *United States* v. *California*, 297 U. S. 175, 185–186, concerning the amenability of the railroad operated in connection with the State-owned San Francisco wharves to the Federal Safety Appliance Act, which applied to "every common carrier in interstate commerce by railroad." 45 U. S. C. 1 *et seq.*

prehends", for the word "means" itself is used in other definitions in the same section (Section 1, Appendix, *infra* p. 78–79). This being so, "the natural distinction would be that where 'means' is employed, the terms and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition" (*Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125, n. 1). Finally, the point is concluded by the fact that "person" is not specifically said to include individuals, and it seems clear that Congress had no intention of excluding wharves, for example, operated by individuals, from the coverage of the Act.

But the matter need not turn on refined textual analysis, for this Court, in decisions holding that States are "persons" under similar definitions in the internal revenue laws and in the Sherman Antitrust Act (*Ohio* v. *Helvering*, 292 U. S. 360, 370; *Georgia* v. *Evans*, 316 U. S. 159), has approved resort to legislative history in these matters.[22] The Congressional debates on H. R. 15455,

[22] In *Georgia* v. *Evans*, 316 U. S. 159, 161, the Court said: "Whether the word 'person' or 'corporation' includes a state or the United States depends upon its legislative environment. * * * The *Cooper* case [*United States* v. *Cooper*, 312 U. S. 600] recognized that 'there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an

64th Cong., 1st Sess., which was enacted into the Shipping Act of 1916 (39 Stat. 728), contain evidence, specifically in point, that the legislation was designed to apply to publicly owned wharves. During discussion of a subsequently defeated amendment which would have removed "wharfage, dock, warehouse or other terminal facilities" from the scope of the Act, reference was made to the existence of great municipally owned wharves and docks, specifically at New York, Los Angeles, Seattle and San Francisco, and the question was asked whether it was intended to deprive the municipalities of control over them. 53 Cong. Rec. 8276. To this Congressman Alexander, Chairman of the House Committee on the Merchant Marine and Fisheries and manager of the bill, replied (*id.*):

> Not at all; only to prevent unjust discrimination between shippers. If they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person.

In this legislative setting, clearly reflecting Congress' full awareness of the important place of the publicly owned wharf and terminal facilities in the contemplated regulatory program, "the word 'include(s)' does not lend itself to such destructive significance" as appellants' argument in-

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intent, by the use of the term, to bring state or nation within the scope of the law'."

volves. Cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 189, 192.[23] The purpose of the Act is to regulate commerce itself, by whomever conducted. An intent to exclude any should therefore clearly appear. What is here pointed out rebuts any such intent.

B. Appellants are not otherwise excluded by the definition of "other person(s) subject to this Act"

Appellant State of California urges that it is not covered by the definition of "other person subject to this Act" on two additional grounds: *First*, that it does not carry on the "business" of furnishing terminal facilities; and, *secondly*, that even if it does carry on such a business, it does not do so "in connection with a common carrier by water." Neither proposition is tenable.

1. California argues that its wharf terminal operations are not a "business" because they are nonprofit, as required by the California Harbors and Navigation Code (Br. California 76). But

[23] In *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, the term "person" in the Elkins Act (32 Stat. 847, 34 Stat. 587; 49 U. S. C. §§ 41–45) was applied to a city, notwithstanding the absence of any available definition specifically including municipalities in the term. The Elkins Act itself contains no definition of the word at all; while the definition contained in the Interstate Commerce Act, to which the Elkins Act was supplementary, is similar to the one in issue here. See 49 U. S. C. 3 (a). And the dissenting opinion of Roberts, J., in the *Union Pacific* case, 313 U. S. 450, 475, 483–485, suggests that the question of the applicability of the statute to public bodies was carefully considered.

the nonprofit nature of the terminal operations is immaterial; the statute reaches all who "actually" furnish the terminal facilities. Cf. *South Carolina* v. *United States*, 199 U. S. 437, 447–448, 463. Nor can there be any doubt that California is "carrying on the business of * * * furnishing * * * terminal facilities," from the functional standpoint of "what it does" (cf. *United States* v. *California*, 297 U. S. 175, 181) in operating such facilities. An apt description may be borrowed from an Interstate Commerce Commission analysis, adopted by this Court, of the function of a port as an artery of commerce. "It levies toll on the traffic in substantially the same manner as do common carriers, in its charges for the use of its facilities in the transfer of traffic between the rail and water carriers" (*Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 634). Certainly in exacting its "toll" for the use of its facilities (see pp. 4–6) *supra*) California carries on a "business," even in the most limited sense of "intercourse of a commercial character" (cf. *Karnuth* v. *United States*, 279 U. S. 231, 244).[24]

2. California also contends that its terminal

[24] As the lower court noted (R. I, 88), the very state legislation relied upon by California provides that the president of the Board of State Harbor Commissioners "shall supervise the conduct of the dock system, the State Belt Railway and all other departments of the harbor *business*." [Emphasis supplied.]

facilities are not furnished "in connection with a common carrier by water." This language was doubtless inserted to distinguish the terminals subjected to the Act from terminals operating solely in connection with rail and other land carriers. Appellants, however, argue that the quoted language limits the coverage of "other person subject to this Act," to persons who, in addition to performing "wharf operations" also perform "part of the act of water transportation" such as "handling, servicing or moving" services in connection with "the act of transportation" (Br. California 77, 78, 81, 82). It is urged that the State neither transports cargo as carrier, nor contracts for its transportation as shipper, and it is further urged that California "takes no part whatsoever," and makes no charge for "handling, servicing or moving" the goods, such functions under California's rental arrangements being allegedly performed by agents and employees of the water carriers, whereas California's charges constitute penalty demurrage whose sole purpose is to keep the piers clear [25]

[25] California's preoccupation with its "penalty demurrage charges" overlooks the "dockage" charges it concededly assesses against the vessels for docking at the wharves and the "toll" charges it assesses against cargo for the privilege of transportation over the piers. (See Br. California 12.) Indeed, in a real sense California can be said to participate in the transportation of the merchandise it handles by furnishing the channel for the transfer of cargo between the land and water carriers.

(*id.* pp. 78–82). The conclusion is thus urged that California furnishes no terminal facilities "in connection with a common carrier by water" and is accordingly not covered by the term "other person subject to this Act."

This argument draws no support from the language of the statute. Its weakness is immediately apparent from the crucial facts that the terminal facilities in question were built for the accommodation of common carriers by water, are in constant use by such carriers, are of practical utility only because they are so used, and are furnished for such use at a price. In such circumstances it is wholly unreal to deny that they are "furnished in connection with a common carrier by water."

Moreover, the construction thus contended for by appellant California is at odds with the Act's legislative history—which, as noted above (*supra*, pp. 32–33), discloses that Congress contemplated that the Act would apply to publicly owned facilities. It cannot be thought that Congress intended the applicability of the Act to depend upon such niceties as whether the public agency's contractual arrangements for use of its terminal facilities did or did not call for it to perform the manual functions incidental to the operation of the facilities.

In addition, the argument in question is not harmonious with this Court's construction of a

provision in the Elkins Act (32 Stat. 847, 34 Stat. 587; 49 U. S. C. 41 (1)) forbidding "any person * * * to offer * * * any * * * concession * * * in respect to the transportation of any property * * * by * * * common carrier." *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 462, 466. There the Court refused to limit the coverage of that provision to "shipper(s) or carrier(s)," notwithstanding that a subsequent clause, providing criminal penalties for its violation, in terms referred to "every person, whether carrier or shipper" who made such concessions;[26] and it ruled that the phrase "in respect to transportation" had no "technical connotation," but merely limited the forbidden concessions "to advantages or disadvantages in transportation" and had no "further effect" (313 U. S. at 466). The phrase "in connection with a common carrier by water" is no more suggestive

[26] The case reached this Court on appeal from an injunction obtained by the Interstate Commerce Commission to restrain certain persons from violating the aforementioned prohibition against concessions, in connection with a plan to promote a produce market in Kansas City, Kansas, to be served by the Union Pacific. Among other things, the plan involved the offer of cash gifts and free rentals to Missouri produce dealers who agreed to move to Kansas City, Kansas. The argument was made by certain of the appellants, who fell within neither category, that the prohibition in question applied only to "carriers" or "shippers," in view of the express reference to such persons in the clause providing for criminal penalties.

of the "technical connotation" urged here by California.[27]

III

THE COMMISSION'S ORDER FIXING MAXIMUM FREE TIME ALLOWANCES AND MINIMUM DEMURRAGE AND STORAGE CHARGES IS WITHIN THE AUTHORITY CONFERRED BY SECTIONS 16 AND 17, AND IS SUPPORTED BY THE COMMISSION'S FINDINGS, WHICH ARE IN TURN SUPPORTED BY THE EVIDENCE

Section 16 of the Act (Appendix, *infra*, pp. 81–82) declares, *inter alia*, that it is unlawful "for any common carrier by water, or other person subject to this act, * * * directly or indirectly * * * To subject any particular person, locality or description of traffic to any undue * * * prejudice or disadvantage in any respect whatsoever." Section 17 (Appendix, *infra*, p. 82) declares in part that "Every such carrier and every other per-

[27] Appellants further argue that even though they may be covered in some respects as persons furnishing terminal facilities "in connection with a common carrier by water," that phrase excludes their wharf storage service from the Act's coverage, on the theory that this is in the nature of a warehouse service furnished to the consignee, in which the water carrier has no interest.) (Br. California 122–126; Br. Oakland 102–106.) This contention is refuted by the very definition of "other person subject to this act," which specifically refers to "any person not included in the term 'common carrier by water,' carrying on the business of * * * furnishing wharfage, dock, *warehouse*, or other terminal facilities in connection with a common carrier by water." [Emphasis supplied.] Whatever may be the ultimate limits on the coverage of the term "warehouse," it plainly includes warehouse facilities operated at shipside.

son * * * shall * * * enforce just and reasonable regulations and practices relating to or connected with the receiving, handling storing, or delivering of property"; and further, that "Whenever the [Commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

The Commission found violations of these provisions on the part of the appellants and other terminals, in connection with their allowances of "free time" and in connection with their charges for wharf demurrage and wharf storage. It accordingly established and ordered the terminals to observe as "just and reasonable practices" schedules of maximum free time allowances and minimum charges for wharf demurrage and wharf storage. We submit that in so doing the Commission acted within the scope of its statutory authority under Sections 16 and 17 of the Act.

The provisions in question endow the Commission with comprehensive authority "to destroy favoritism," intentional or otherwise, cf. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361, 391, 398; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749–750; *Mitchell* v. *United States*, 313 U. S. 80, 94–95.[28] And it is well set-

[28] As the lower court remarked (R. I, 90): "Section 16 of the Shipping Act is substantially identical with § 3 (1) of

tled that "the determination of the existence of forbidden preferences" and the "finding of reasonableness" involve questions of fact committed to the Commission's informed judgment (cf. *United States* v. *Trucking Co.*, 310 U. S. 344, 352; *Virginian Ry.* v. *United States*, 272 U. S. 658, 655–666), upon which its "findings of fact * * * can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority" (*Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. Cf. *United States* v. *New River Co.*, 265 U. S. 533, 542). "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Miss. Valley Barge Co.* v. *United States*, 292 U. S. 282, 286–287). These familiar principles leave no room for invalidation of the Commission's order in these cases.

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the Interstate Commerce Act," 49 U. S. C. 3 (1). More generally, this Court has stated:

"The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion." *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480, 481.

A. The statute, the findings and the evidence support the Commission's order fixing maximum free time allowances

Concerning free time the Commission found discriminatory in violation of Section 16 and unreasonable in violation of Section 17 the practice of a number of the terminals, not including California, of extending their "regular" free time period of ten days for such indeterminate additional time as might be necessary to cover delays in vessel sailings, and the practice of Oakland of allowing whatever additional time was "warranted and equitable in each individual case" in its port manager's judgment (R. I, 24). It also found that as to certain kinds of traffic the basic ten-day free time period offered by the terminals was unreasonable because excessive and hence violative of Sections 16 and 17 (R. I, 24–26). The Commission's order prescribed a schedule of allowances providing 5, 7 or 10 days free time, depending upon the character of the traffic, with one exception authorizing 21 days for off-shore shipments of packaged oil, and left the terminals to make reasonable rules and regulations in connection with the prescribed schedule, including the matter of delays in vessel sailings.[29]

Appellants do not contest that the statute authorizes the Commission to fix maximum free time allowances in proper cases; they assert that the findings and the evidence are here insufficient.

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[29] For the reasons for the variations, see Ex. 61, R. II. 908–911.

The essence of the Commission's findings as to the discriminatory nature and unreasonableness of excessive free time allowances is that this results in a wastage of valuable storage facilities, involving costs whose recoupment ultimately casts a burden upon nonusers of the surplus period; and that the furnishing of valuable storage facilities free of charge results in substantial inequality of service among different shippers and cargoes, unduly preferring users of the surplus period over nonusers, and is beyond the "recognized functions" of the terminals (R. I, 24).[39]

The Commission's condemnation on these grounds of the practice of granting excessive free time allowances, as unduly preferential and un-

[39] The same proposition was well stated in the Edwards-Differding preliminary report, as follows (Ex. 60, R. I, 797):

"* * * If [the free time] is too long, it constitutes an uneconomic use of valuable space for which the average shipper can ill afford to pay whether in the form of a higher toll charge or a wharf demurrage charge.

"In the long run every additional day's time adds to the terminal costs and eventually this cost is passed on to the consumer of the service. If the requirements of certain shippers or certain cargoes demand that the goods remain for extended periods on the wharves, it appears as only reasonable that those enjoying this additional service should be the ones to pay for it."

The Commission's findings concerning the extension of excessive free time allowances under the caption "free time" should be read in conjunction with the subsequent findings concerning the maintenance of noncompensatory storage charges (see p. 62, *infra*), for the Commission regarded the two practices as different forms "of the same offense" (R. I, 33).

reasonable, finds ample support in the authorities. See pp. 63–69 *infra*; cf. *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, 262.[31]

Nor is there any merit in the contention that there was not sufficient evidence to sustain the Commission's determination that free time allowances made by the terminals, including appellants, were excessive insofar as they surpassed the limits prescribed in its order. In the language of the Commission, "nearly all of the witnesses who testified on this subject favored stricter free time regulations than those now in effect" (R. I, 25). There was also evidence that the San Francisco Bay terminals had originally allowed only three to five days' free time, but under "the pressure of competition" had extended the allowance to ten days and more (R. I, 245; Ex. 60, R. I, 797). The Commission further had before it evidence as to the free time policies in effect at other West Coast ports, showing that while 10 days was the customary allowance on foreign and off-shore trades, the customary allowance on other types of

[31] "A discrimination which is produced by charging equal rates for unequal service is prohibited by the statute just as much as one resulting from unequal rates for equal service." Stone, J., dissenting in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 656. This should hold true in the case of a discrimination produced by a "free" service which favors certain shippers with more service than others obtain. A practice which is unduly preferential in nature is likewise inherently "unfair and unreasonable." Cf. *Union Pacific R. R.* v. *Updike Grain Co.*, 222 U. S. 215, 220.

trade was only five days (Ex. 60, R. I, 798). In addition, the evidence included the schedule of free time allowances recommended by Edwards and Differding to the California Railroad Commission for the San Francisco Bay ports after a study of their organization and traffic, which recommendation the Railroad Commission substantially adopted in its order (Ex. 61, R. II, 911).

Clearly, this evidence amply supports the Commission's finding that the free time allowances granted by the San Francisco Bay terminals were excessive. In particular, evidence of what allowances were made at other terminals "had a tendency to show what was reasonable and therefore permissible" at appellants' terminals. *O'Keefe* v. *United States,* 240 U. S. 294, 303; cf. *Youngstown Co.* v. *United States,* 295 U. S. 476, 480; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500. And more broadly, "the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the * * * Commission, expert in (such) matters * * *, may be presumed to be able to draw inferences that are not obvious to others." *O'Keefe* v. *United States, supra,* 240 U. S. at 303. Of course, in following the recommendation of the California Railroad Commission in preference to adopting the scale of allowances in effect at other ports, slightly higher on some classes of traffic, the Commission

merely exercised its lawful discretion. Cf. *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 550; *Interstate Commerce Commission* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 98; Stone, J., dissenting in *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, at 110.

B. The statute, the findings and the evidence support the Commission's order fixing minimum wharf demurrage and storage charges.

In general, wharf demurrage and storage charges are made for the storage facilities and services rendered by the terminals when goods are left beyond the free time period (R. I, 26, 148–151; Ex. 60, R. I, 793). There is in theory a functional difference between demurrage and storage charges in that the former is ordinarily a penalty charge designed to clear transit space by forcing the cargo off the dock, or, where terminal facilities permit, into wharf storage on a period basis (R. I, 26, 150–151, 244, 252–253, 709; Ex. 61, R. II, 918).[32] However, the evidence here showed, and the Commission found that, as a result of competitive stress, wharf demurrage rates had been so reduced that it was difficult to distinguish between wharf demurrage and storage (R. I, 29, 523; Ex. 60, R. I, 793–794).[33] In fact, the evidence showed that at

[32] Cf. *Penna. R. R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323.

[33] While appellant California does have in effect a schedule of true penalty demurrage rates, it also provides a lower "bulkhead" storage rate at its steamship assigned facilities;

Stockton and Oakland the wharf demurrage rates were lower than public warehouse storage rates (R. I, 292, 528).

The Commission's determination of the existence of unduly preferential and unreasonable practices in connection with these charges was based on its findings that they did not compensate the terminals for the services rendered (R. I, 40), and thus gave rise to the same basic evils as the excessive free time allowances. In the Commission's language (R. I, 26), "the question here is whether respondents are unduly discriminating between such cargo" left beyond the free time period "and that removed during the free time period. The principal evidence on this point is an analysis of the cost of providing wharf storage to determine whether that class of service is self-sustaining or is furnished at rates so low as to cast a burden upon other services."

The Commission stated that as a result of "aggressive and destructive competition * * * the rates have been so reduced and * * * practices so liberalized" that there was hardly any remaining distinction between "demurrage services and warehouse storage services" (R. I, 28, 29). It found further that the evidence as to the cost of these services showed that the going rates produced revenues "far below the cost of

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and its rate structure at piers 45 and 56 (assigned to Golden Gate and State) is on the same level as that of its competitors. See pp. 10, 13, *supra*.

the service," with the consequence that "users of wharf storage are not providing their proper share of essential terminal revenues," while a disproportionate share of this burden was imposed upon users of other services, for which the terminals had adopted a scale of rates previously found to be reasonable by the California Railroad Commission (R. I, 29, 32, 18).[34] The conclusion that these conditions resulted in violations of the Act was stated as follows (R. 33, 35):

> The next question is whether granting storage at noncompensatory rates is unduly preferential and prejudicial in violation of section 16 of the Shipping Act, 1916, and an unreasonable practice in violation of section 17 thereof. The storage cases previously mentioned * * * established two propositions. First, the furnishing of free storage facilities beyond a reasonable period results in substantial inequality of service as between shippers. Clearly, the furnishing of such facilities at noncompensatory rates is merely a less serious form of the same offense. Second, any preferred treatment by charges or otherwise of certain classes of cargo results in discrimination against other cargo. * * *
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> Oakland contends that there can be no discrimination since the rates are open to

[34] See p. 64, *infra*.

> all shippers alike. In a sense this is true. However, the commercial practices of those shippers who supply the major portion of tonnage handled by respondents obviously do not permit of their placing their goods in storage. Furthermore, it should not be overlooked that the practice of furnishing one service below cost has the tendency to prevent any downward revisions of rates for other services however justified they may be. Clearly, such a practice is unreasonable.

The Commission accordingly prescribed "as a reasonable regulation" (R. I, 40) a schedule of minimum charges for demurrage and storage services, developed in relation to the lowest handling and floor space costs disclosed by unit cost studies which covered the principal private terminals in the area and the Port of Stockton, a public terminal. Admitting that even this minimum was "too low," the Commission nevertheless concluded that it should be adopted because it would "(1) * * * bring about uniformity on a minimum basis * * * not in excess of the cost of the service to any of the respondents, (2) * * * remove many of the abuses disclosed by the record, and (3) * * * provide a standard from which departures can be made on individual commodities as they appear to be justified by further proof" (R. I, 36, 38).

(1) THE TERMINALS' PRACTICES AS TO WHARF DEMURRAGE AND STORAGE CHARGES CONSTITUTE "REGULATIONS AND PRACTICES" WITHIN THE MEANING OF SECTION 17 OF THE ACT

Appellants' first challenge to the wharf demurrage and storage phase of the Commission's order is on the ground that storage charges do not constitute "regulations and practices relating to or connected with the receiving, handling, *storing* * * * of property" [emphasis supplied] within the meaning of the second paragraph of Section 17 of the Act. They argue, in substance, that this conclusion must follow because rates are expressly mentioned in other provisions of the Act dealing with common carriers by water—namely, in the first paragraph of Section 17, in Section 18 and in Section 19—but not in the second paragraph of Section 17, which confers jurisdiction over the "regulations and practices" of "other person(s) subject to this Act." But this argument runs counter to the normal broad meaning of the generic term "regulations and practices," to the legislative history of the Act, to prior decisions of this Court, and furthermore would lead to an incongruous result.

The normal meaning of the terms.—The words "regulations and practices" are fundamentally words of broad meaning; their normal meaning would include all the steps, customs and requirements pursued or imposed in dealing with the matters which they concern, in this case the receipt, handling, storage and delivery of goods.

Normally included within their broad compass would be various specific matters such as free time, rates, special charges for handling, conditions dealing with the safety of the goods such as fire protection, proper crating, inspection, protection against moisture, and the like. One cannot readily think of a more prominent and interesting "practice" in connection with storing property than the practice of charging a fee in return for the privilege of occupying space with goods. It is difficult to believe that Congress could have overlooked the fact that storage rates are indubitably "practices." To accept appellants' view would be to assert that Congress intended such violence to normal meaning to rest upon inference.[35] We shall show that Congress cannot properly be accused of such bad draftsmanship.

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[35] The inferences on which appellants rest are shaky. They infer that because the power to fix rates is specifically conferred in connection with transportation by Sections 18 and 19, such power in connection with "other persons" cannot be found in the authority to regulate "practices." If carried to its logical conclusion this argument, which is a sort of *expressio unius* argument, would mean that no power was conferred to fix the minimum rates of carriers because Section 18 is specific only as to the power to fix maximum rates. And, indeed, appellants so argue (Br. California 94; Br. Oakland 66). It is clear, however, that the power to prevent discriminatory rates (Secs. 16, 17, and 18) necessarily involves the power to fix minimum rates in cases, such as those of inordinately low "missionary rates" (see *Minn. & St. L. R. Co.* v. *Minnesota*, 186 U. S. 257, 267; *Southern Pacific Co.* v. *I. C. C.*, 219 U. S. 433, 439), where the discrimination can most effectively be cured by fixing minimum rates. The

The legislative history.—The legislative history contains a clear indication that the framers of the statute had no such limited notion of the meaning of the phrase in question as appellants suggest but on the contrary contemplated that it would subject the reasonableness of rate-making policies of "other person(s) subject to this Act" to the Commission's scrutiny. The pertinent episode is a discussion which occurred in the course of the Senate Committee hearings on the legislation,[36] and related to the original definition of "other person subject to this act." H. R. 15455, 64th Cong., 1st sess., which became the Shipping Act of 1916 (39 Stat. 728), originally provided a

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instant case is another such example. The 1938 amendment to the Intercoastal Shipping Act (52 Stat. 964. 46 U. S. C. 845a) expressly authorizing the establishment of "just and reasonable maximum or minimum, or maximum and minimum rate(s)" for water carriers in interstate commerce except on the Great Lakes, adds nothing to appellants' inference since it could not do so without also denying the preexisting power to fix maximum rates, a power specifically conferred and on the existence of which the entire inference rests. This amendment did indeed confer new power to fix rates, in two respects not helpful to appellants: To fix minimum rates even where existing ones are not discriminatory, and thus to prevent rate wars more effectively than could be done under a power to fix minimum rates only where necessary to prevent discrimination (cf. *Swayne & Hoyt, Ltd.*, v. *United States*, *supra*, at p. 304).

[36] This material is an appropriate source from which to ascertain the Congressional purpose. *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 538, 547; *Securities & Exchange Comm.* v. *Robert Collier & Co.*, 76 F. (2d) 939 (C. C. A. 2).

somewhat broader definition of the term than that ultimately adopted, as follows (the difference consisting in the italicized words which were stricken before passage):

> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding, *ferrying, towing* or furnishing *transfer, lighterage,* wharfage, dock or other terminal facilities, *in or* in connection with a common carrier by water.

The discussion in question was occasioned by the appearance of witnesses representing towage and lighterage interests, who sought exemption from the bill and accordingly proposed the elimination of the italicized language from the foregoing definition of "other person subject to this Act."[37] See Hearings before the Subcommittee of the Committee on Commerce, United States Senate, 64th Cong., 1st sess., on H. R. 15455, pp. 132–133. The testimony presented in support of the proposal, devoted largely toward demonstrating the impracticability of attempting any regulation of the towage and lighterage industry, provoked the following instructive colloquy (*id.* at p. 141):

> The CHAIRMAN. You are, in a sense, a public-utility service. I do not see that you have assigned any reason why the Government should not regulate your public-serv-

[37] The proposal was ultimately adopted. See 39 Stat. 728.

ice charges as it regulates other public-service charges, except the suggestion that it might be very difficult for the board to fix and establish just rates.

Mr. MORAN. It is. The conditions are so varied.

Senator FLETCHER. The bill does not contemplate the board undertaking to do that, in the first instance. It contemplates that you people shall yourselves agree *upon regulations and practices that would be uniform and reasonable,* and then afterwards if the board should find that they are not reasonable but that they are unreasonable—whenever the board finds that *any such regulation or practice* as you establish is *unjust or unreasonable*—it then may determine and *prescribe and order enforced a just and reasonable regulation or practice.* [Emphasis supplied.]

This is inconsistent with appellants' thesis that Section 17 leaves the Commission powerless to deal with any matters involving the rate-making policies of "other person(s) subject to this art," particularly since the precise expression employed by Senator Fletcher removes any doubt that he had that very provision [38] in mind.

Prior decisions of this Court.—In addition, appellants' argument that the phrase "regulations and practices" does not extend to any rate-making activities is inconsistent with prior decisions of

[38] H. R. 15455, 64th Cong., 1st Sess., sec. 18.

this Court dealing with similar terminology in the Interstate Commerce Acts. See *B. & O. R. Co.* v. *United States*, 305 U. S. 507, 513, 522, 524; *Adams* v. *Mills*, 286 U. S. 397, 409, 416. In particular, the Commission's treatment of the maintenance of noncompensatory rates as an "unreasonable regulation and practice" is amply supported by the *B. & O.* decision, *supra*. That case arose out of an Interstate Commerce Commission investigation in which it was found that various "warehouse services were performed 'at rates and charges which fail to compensate' the carriers for the cost." 305 U. S. at 514, 518. The Commission determined that among other provisions Section 3 (1) of the Interstate Commerce Act, a provision substantially identical to subdivision First of Section 16 of the Shipping Act, was violated by the practice of selling storage space at less than cost since not all shippers were in a position to avail themselves of the services, and ordered the cessation of the practice. This Court upheld the order, saying (305 U. S. at p. 524):

> Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike, there is violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasionad by warehousing practices designed to attract a volume of rail business.

Furthermore, in upholding the order against the carriers' contention that it was invalid because the Commission had only considered the cost of the services involved, without making any findings as to whether their market value exceeded the charges made therefor, this Court said, *inter alia* (305 U. S. at p. 524):

> Where competitive *practices* such as existed here are absent, reasonable or market value charges may well be the test. The power, however, is in the Commission, whenever it is of the opinion that *any practice* is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what *practice* will be just, fair and reasonable. [Emphasis supplied.]

The supporting citation was to Section 15 (1) of the Interstate Commerce Act (49 U. S. C. 15 (1)) and the context makes it clear that the precise reference was to the following language in that provision:

> Whenever * * * the commission shall be of opinion that any * * * regulation, or practice whatsoever of * * * carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the commission is authorized and empowered to determine and prescribe what * * * regulation, or practice is or will be just,

fair, and reasonable, to be thereafter followed * * *.

It is evident, then, that this Court construed the power to "prescribe what * * * regulation, or practice is or will be just, fair, and reasonable" as encompassing the prescription of storage rates ample to return cost. It is fair, therefore, to conclude that the comparable language in Section 17 of the Shipping Act similarly authorizes the Maritime Commission to prescribe storage rates which will return cost.[39]

The quoted language in the *B. & O.* opinion is peculiarly significant here, for Section 15 (1), dealing with prohibited "practices", was applied notwithstanding express language in the very same section conferring control over "any * * * rate, fare, or charge whatsoever * * * charged, or collected by any common carrier * * * subject to this Act," and expressly authorizing the establishment of minimum rates as a curative. This refutes appellants' argument for a restricted construction of the term "practices" here—according to which the express reference to rates in Section 15 (1) should have made it clear that

[39] This Court has heretofore drawn attention to the close parallel between the Shipping Act and the Interstate Commerce Act and has said: "* * * we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481.

"practice" did not cover anything pertaining to rates. The Court refused to draw the inference appellants would have it draw here, i. e., that express reference in one section to the power to fix rates shows a Congressional purpose to exclude rate-making practices from the "practices" which are elsewhere placed within administrative regulatory competence.

Finally, the point would seem to be foreclosed by this Court's decision in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303, holding that the first prohibition in Section 16 (Appendix, *infra,* p. 81), against giving undue advantages or preferences, prohibits the charging of discriminatory rates. The prohibitions in Section 16 are operative against "other person(s) subject to this Act" as well as carriers, so the charging of discriminatory rates by "other persons" is also prohibited. And it seems clear that both the second paragraph of Section 17 and Section 18 were designed to implement the prohibitions of Section 16 by giving the Commission power to eliminate by regulation the prohibited evils; thus the conclusion seems compelled by the *Swayne & Hoyt* case that under Section 17 the Commission has power to prevent "other persons" charging discriminatory rates. This power, of course, can be most effectively exercised by designating what

rates the Commission will deem nondiscriminatory.

Appellants' construction deprives the Act of a sensible structure.—Another vice in appellants' argument denying the Commission's power to fix non-discriminatory storage rates is that it would limit the Commission's power of enforcement of Section 16 in connection with storage rates to the utilization of the criminal sanctions in that section. Section 29 of the Act (46 U. S. C. 828) provides for the civil enforcement of Commission orders and it is not to be supposed that Congress intended to preclude utilization of this remedy in the case of storage rates only, by denying the regulatory and enforcement agency the power to issue orders enforcing Section 16 in such cases.[49] It is reasonable to conclude that Congress intended to empower the Commission to deal with discriminations resulting from non-compensatory storage rates as it could with other violations—by regulatory order. Such a conclusion is, as we pointed out, *supra*, p. 50, in accord with the normal meaning of the language of Section 17, empowering the Commission to "order enforced a just and reasonable regulation or practice," "relating to or connected

[49] In *Swayne & Hoyt, Ltd.* v. *United States*, *supra*, an order enforcing the prohibitions of Section 16 in the case of transportation rates was upheld.

with the receiving, handling, storing, or delivering of property."

This case illustrates that appellants' view would deprive the Act of a sensible and effective structure. No one denies that "free time" is a "practice" which in a proper case the Commission may regulate (Cf. R. I, 89). But, as the Commission clearly saw (R. I, 33–34), free time is not a practice separate and apart from storage and demurrage rates and cannot be dealt with separately. Actual experience proves this to be so. In *Storage Charges under Agreements 6205 and 6215,* 2 U. S. M. C. 48 (1939), terminals were found to be defeating the free time regulations previously imposed by the Commission in *Storage of Import Property,* 1 U. S. M. C. 676 (1937), by assessing nominal storage charges after the free time expired. In order that the free time regulations could be made effective the storage charges had to be regulated as well.[41] Similarly here, if the Commission could regulate practices as to free time but not practices as to storage and demurrage charges, any regulation restricting the generosity of the terminals' free time allowances could be easily counteracted by reduced or nominal storage charges after the free time ended.

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[41] The order regulating the storage charges was upheld in *Booth S. S. Co. et al* v. *United States,* 29 F. Supp. 221 (S. D. N. Y.).

Here the Commission is seeking to combat evils inherent in the terminals' over-generous storage practices. The evil could not be effectively dealt with without controlling storage and demurrage charges as well as free time. It only confuses the real issue to focus exclusively on the form the Commission's order necessarily took, to disregard its functional character, and to protest its validity on the ground of the absence of any specific authority in the statute to establish a minimum level or rates. For in providing Section 17 as an instrumentality for accomplishing the policies of the Act, Congress did not undertake to "define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations" which might call for correction, but left the "adaptation of means to end to the empiric process of administration." *Cf. Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. In the proper focus, the real test of the propriety of the order is simply whether it is "arbitrary or capricious," or to put the question another way, whether it is reasonably "adapted to the situation which calls for redress" (*cf. Labor Board* v. *Mackay Co.,* 304 U. S. 333, 348). See *e. g., O'Keefe* v. *United States,* 240 U. S. 294, 303–304; *Houston* v. *St. Louis Packing Co.,* 249 U. S. 479, 483, 487; *American Telephone and Telegraph Co.* v. *United States,* 299 U. S. 232, 236–237, 243; *Pacific States Co.* v. *White,* 296 U. S. 176, 182.

So tested, there can be little doubt of the propriety of the order. It strikes directly at the root of the evil by prescribing a level of charges more nearly approximating the costs of the services furnished, but not "in excess of the cost of the services to any" of the terminals (R. I, 38).[42] In essence, the order is no different from that involved in *B. & O. R. Co.* v. *United States, supra,* ordering the carriers to refrain from furnishing the warehouse services there in question at less than cost. And, indeed, the Commission's order here would seem preferable by virtue of its specificity, both from the standpoint of enforcement by the Commission and compliance by the terminals. *Cf. American Telephone and Telegraph Co.* v. *United States,* 299 U. S. 232, 246–247; *Georgia Comm.* v. *United States,* 283 U. S. 765, 771–774; Stone, J., dissenting in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 116.

(2) THE COMMISSION'S ORDER WAS FULLY SUSTAINED BY ITS FINDINGS AND THE EVIDENCE REGARDING DISCRIMINATION

The Commission's condemnation of the practice of furnishing wharf demurrage and storage service below cost was based on the findings that it cast an undue share of the burden of providing terminal revenues on users of other services and

[42] There is no merit in the suggestion that the inclusion in the Commission's schedule of the 5¢ "penalty" rate for the first five days demonstrates that the schedule of charges fixed by the Commission is more than compensatory to the

tended to prevent reductions in the charges for such other services "however justified"; and that the practice operated to prefer those shippers able to avail themselves of the storage services over other shippers, supplying the major part of the traffic, whose "commercial practices * * * obviously do not permit of their placing these goods in storage" (R. I, 35). That these findings amply sustain the Commission's ultimate conclusion is clear from prior decisions of this Court.

In condemning the practice in question because it cast an undue burden on users of other services and tended to prevent reductions which might otherwise be made in the charges therefor, the Commission merely restated a proposition long ago declared by this Court in *East Tenn., &c. Ry. v. Interstate Commerce Commission*, 181 U. S. 1, 19–20, as follows:

> That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case pro-

terminals (Br. California 121–122; Br. Oakland 90–91). Even if it were proper to consider that item by itself, apart from the balance of the Schedule, the fact is as Mr. Differding expressly testified, that the so-called "penalty demurrage" rate of 5 cents per day is generally insufficient to cover the terminals' costs on "penalty cargo" (R. I. 712–713).

> duce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. * * *

See also *Intermountain Rate Cases*, 234 U. S. 476, 483.

There is no escaping the force of this proposition in the circumstances revealed by the evidence here. The terminals offer a number of other services, besides wharf demurrage and storage, for which they made independent charges of both the shippers and the vessels (R. I, 141–142; Ex. 61, R. II, 878–908). In particular, the record shows that the terminals concerned, including appellants, raised their "toll" charges against cargo [43] by 10 cents per ton in December 1939, shortly before the

[43] "Toll charges are assessed against cargo for the privilege of transportation over or through terminal, or being loaded or discharged at terminal" (R. 18, n. 2).

institution of the instant proceedings, because "they found they needed more money" (R. I, 263, 473–474, 716). This increase practically doubled the previous average toll revenues of approximately 11 cents per ton and effected the recommendation originally made by the California Railroad Commission at the time of its investigation in 1935–1936 (Ex. 61, R. II, 889, 891–894). Furthermore, as noted in the Commission's report (R. I, 32–33), in the case of the two major private terminals unit cost studies of record for the year 1939 establish that deficits "from all operations * * * would have been wiped out and net profit shown * * * if they had charged only the actual cost of furnishing the [storage] service in 1939 as developed by the formula" (R. II, 1244, 1309)." Manifestly, then, the record disclosed the kind of situation in which the practice of charging noncompensatory rates was denounced in the *East Tenn. &c. Ry.* case, *supra,* and accordingly furnished ample evidentiary support for the Commission's similar condemnation of the practice here.

Insofar as the Commission found an unlawful preference in the availability of the below-cost services to some shippers and not to others, its determination is fully sustained by *B. & O. R. Co.* v. *United States,* 305 U. S. 507 (see pp. 54–57,

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" For the other services generally furnished by the terminals, see Ex. 61, R. II, 878–908; Ex. 60, R. I, 798–800.

supra), where the issue concerned the validity of an analogous Interstate Commission determination that the furnishing of warehouse services at less than cost by common carriers violated the provisions of the Interstate Commerce Act outlawing rebates and discrimination. In upholding the Commission, this Court said (305 U. S. at 507, 524, 525):

> * * * Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike, there is violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged them the loss occasioned by warehousing practices designed to attract a volume of rail business.
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> * * * * *
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> * * * If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of § 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is

> unlawful and the remedy applied by the order valid in these circumstances.

See also *United States* v. *Trucking Co.*, 310 U. S. 344, 351, 353–354.

A parallel situation obtains here. The rates for the other services rendered by the terminals (see p. 5 *supra*) "have charged against them" (R. 35) the loss from the noncompensatory storage charges caused by the terminals' bitter competition for traffic (R. I, 28, 710, 716–717). Shippers supplying the bulk of the terminals' traffic, as found by the Commission (R. I, 35), are not in a position to avail themselves of the below-cost storage services. Yet, such shippers are subject to the terminals' "toll" charges (see p. 5 *supra*), which they must pay in full without any offset from the warehousing. Likewise a burden is cast on the vessels which must pay "dockage" and various other service charges. (See R. 716–717.)

Appellants argue that the *B. & O.* case is distinguishable, that nothing in the record at bar shows that "some shippers are not in a position to avail themselves" of the below-cost storage services. However, there is no merit in this contention. For the Commission's chief witness expressly testified that the burden of the noncompensatory storage charges was cast "upon the other users of the facilities, *which in this case means*

the vessels and those shippers who have transit cargo and do not take advantage of the wharf demurrage space" (R. I, 717).[45] And this testimony is corroborated by evidence revealing that the amount of the cargo stored at the terminals represents only a small fraction of the total cargo handled.[46] Indeed, that fact alone would establish that most shippers are not practicably in a position to utilize the storage services. Cf. *O'Keefe* v. *United States*, 240 U. S. 294, 303; *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297, 305–307.[47]

[45] Emphasis supplied.

[46] The actual figures shown by the record are as follows:

	Total tons general cargo handled 12 months	Total tons general cargo stored 12 months	Percentage of tons cargo stored to tons cargo handled
Howard	386,439 [1]	29,429 (Ex. 130, R. II, 1283)	7.62
Encinal	560,760 [1]	33,006 (Ex. 140, R. II, 1300)	5.89
Stockton	395,158 [1]	6,175 (Ex. 137, R. II, 1291)	1.56
Oakland	595,029 [1]	18,285 [2] (Ex. 167, R. II, 1308)	3.07
San Francisco (piers 45 and 56).	223,117 (Ex. 135, R. II, 1276A).	5,674 [2] (Exs. 135, 135a, b, c, R. II, 1278A, 1280A).	2.54

[1] These figures, which appear in the Commission's Report (R. I, 28), were taken from Exhibits 171, 170, 138, 162, respectively, omitted in printing.

[2] Based on average balance of tons on storage at end of each 12 months.

[47] The reference to the fact that no shippers complained of the practices condemned by the Commission is pointless. "The fact that the Commission acted on its own motion without complaint by individual shippers did not detract from the Commission's power to protect and maintain a transportation system free of partiality to particular shippers." *United States* v. *Trucking Co.*, 310 U. S. 344, 353–354.

It is, of course, immaterial that the practices in question may have been resorted to without any motive or purpose to discriminate, but solely in order to meet competition; or in the case of the public terminals, to foster municipal development. Cf. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361, 398; *Intermountain Rate Cases*, 234 U. S. 476, 483; *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, 524–525; *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 462–463, 464–468.

(3) THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANTS' STORAGE AND DEMURRAGE CHARGES WERE NONCOMPENSATORY

The next ground upon which appellants object to the Commission's order as to wharf demurrage and storage charges is narrower in scope, disputing its validity only in so far as it is directed to appellants. This consists in the contention that in their particular cases the Commission's finding that the charges in question were noncompensatory is not supported by the evidence. The Court below considered this contention and held that the finding was supported by evidence (R. I, 91–92).

Conceding, in effect, that its charges are noncompensatory if floor space costs [48] are taken into

[48] This refers to cost of physical plant used for storage, principally transit sheds, and includes the annual charge for maintenance, depreciation, return and taxes (Ex. 61, R. II, 907).

account, Oakland contends that the Commission erred in including such costs in its determinations, instead of confining itself to "out-of-pocket" costs. The theory of this argument is that if the storage charges meet the "out-of-pocket" expenses incurred in rendering the service, they cannot be deemed to cast a burden on the charges for other services (Br. Oakland 77–78).[49] And, by reference to the table of average revenues and costs shown for the East Bay terminals[50] in the appendix to the Commission's report, Oakland seeks to establish that its storage charges do cover its "out-of-pocket" expenses.

Appellant California's argument in this connection is that the record does not show that its charges are substantially noncompensatory or do not return out-of-pocket costs (Br. California 122).

However, there is no merit in these contentions,

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[49] This argument emphasizes the discrimination which resulted from the old demurrage rates. The argument would free one class of user from any charge for the physical plant, which obviously must be paid for somehow, and would cast the entire burden on other users. The Commission's rejection of this argument is not unreasonable. Cf. *Nor. Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, 596–598. As the court below held (R. I, 92), the determination of the proper cost basis was a question of fact for the Commission to decide (*Swayne & Hoyt Ltd.* v. *United States*, *supra*, at p. 304; cf. *Groesbeck* v. *Duluth, S. S. & A. Ry. Co.*, 250 U. S. 607, 615).

[50] This includes all of the wharves affected by the Commission's order except those owned by California (Ex. 60, R. I, 779).

for although appellants here, urging the inappropriateness of their accounting methods, failed to supply the unit costs of their demurrage and storage services under the Edwards-Differding formula, the record fully supports the Commission's finding that the general data submitted instead "when considered with the cost developed by Howard, Encinal and Stockton, indicate[s] that their [appellants'] rates are far from compensatory" (R. I, 31).

It will be helpful at this point to recall the background and basis of the cost data developed for Encinal, Howard, and Stockton, for the year 1939 in the case of the first two, and 1940 for the latter, the latest figures available at the time of the Commission's hearing. The groundwork for this data was the original Edwards-Differding study for the California Railroad Commission of the over-all costs and revenues of the principal private terminals in the area, based primarily on their 1935 operations. (R. II, 873–967; I, 243–244.) As shown in the Statement, *supra*, pp. 9–15, this study was exhaustive, except with respect to Oakland and California, over which the Railroad Commission had no jurisdiction. A cost formula was developed from this study and the rates recommended by the Railroad Commission in 1935 were based on this formula.

This cost formula furnished the model for the formula used to develop the aforementioned data

regarding 1939 and 1940 costs at Encinal, Howard and Stockton, for purposes of the proceeding at bar (R. I, 29–32; Ex. 62, R. II, 967). The costs thus developed, taken in conjunction with revenues, revealed that all three terminals were operating their wharf demurrage and storage services at a substantial loss (see Statement, *supra*, p. 16).

In the light of such evidence, the untenability of Oakland's argument, even on the assumption that only "out-of-pocket" costs could be considered, becomes immediately apparent. Nothing in the record suports its argument that its storage or demurrage charges cover out-of-pocket costs,[51] and the foregoing data strongly suggests that the contrary is true. Thus the record shows that the average monthly storage or demurrage revenue on all commodities at Oakland for 1939 was only 24.5¢ (Statement, *supra*, p. 16). Not only does this fall short of the lowest average revenue shown for any of the terminals studied, but, as the Commission pointed out, it falls considerably short of Encinal's average "fixed" unit cost per ton of 33.6¢, the lowest shown by the studies for normal piling (R. I, 30). This latter figure being exclusive of

[51] On the contrary, Mr. Differding testified that even when measured against out-of-pocket costs the demurrage and storage charges were not "carrying [their] way" in relation to the terminals' charges for their other services and were thus burdening users of other services (R. I, 716–717).

high-piling, overhead[52] and floor space cost, it would presumably correspond to what Oakland has in mind as "out-of-pocket" costs.

Moreover, the contrast between Oakland's average revenue of 24.5¢ per ton and the corresponding figures for Encinal, Howard and Stockton, 31.2¢, 42.6¢ and 64.5¢, respectively (R. I, 30), conclusively demonstrates the fallacy of Oakland's assertion that its existing rates return it more than out-of-pocket costs[53] (Br. Oakland 91–94). The attempt to prove this assertion is made upon the basis of figures drawn from the comparative statement of revenues and costs shown, on a composite basis, for East Bay terminals in the Appendix to the Commission's Report (Br. Oakland 91–94). But in view of the fact that Oakland shows an average revenue far below those of the other East Bay terminals, it can hardly assume, as its argument necessarily does, that the composite revenues shown in that Appendix are representative of its own.[54] Furthermore, Oakland's argument in this connection involves the highly improbable assumption that it incurs no handling costs whatsoever.

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[52] "Unallocated overhead items" comprise more than 50% of all terminal costs (R. I, 254; Ex. 61, R. II, 926).

[53] Oakland does not challenge the fact that its rates are non-compensatory if other expenses are taken in account.

[54] It is noteworthy also that the data shown for Encinal, Howard and Stockton reveal that in each case average revenues are below costs for normal piling, exclusive of both overhead and floor space costs. Statement, *supra*, p. 16.

It is evident, we submit, that the Commission's finding that Oakland's demurrage charges were non-compensatory is supported by evidence.

The evidence as to the remunerativeness of California's charges was generally less specific than that available in Oakland's case. But the Commission's conclusion that, considered with the detailed cost data shown for Encinal, Howard and Stockton, this evidence indicated that California's charges were non-compensatory, is nonetheless justified.

Certainly as to the charges made by the State at piers 45 and 56, which remain subject to its supervision and control notwithstanding "assignments" to Golden Gate Terminals and State Terminal Company, Ltd., respectively (see pp. 4–5, *supra*), the picture is essentially no different from that shown with respect to Oakland's charges. The charges fixed by the State at piers 45 and 56 parallel those of the East Bay terminals (R. I, 454–455). And the record shows that the average monthly demurrage revenue per ton received on all commodities at these terminals is only 30.9¢ (Statement, *supra*, p. 17), which, as in Oakland's case, fails to equal the lowest "fixed" unit cost per ton (i. e., out-of-pocket cost, which is cost exclusive of high-piling, overhead and floor space costs) found among the terminals for which unit costs were developed.

But aside from the particular facts shown as to piers 45 and 56, the record otherwise supports

the Commission's conclusion that California's charges were non-compensatory. The evidence in question consisted chiefly in a statement showing income, expense and other data of the State's terminal operations at San Francisco in the fiscal years ending June 30, 1939 and 1940 (Ex. 135, R. II, 1258), which was submitted by the State in lieu of the unit cost studies requested by the Commission. This shows an over-all net income, designated as "Surplus to accumulated excess income for replacement of facilities and retirement of bonds," of $215,356.85 for 1940 and $88,363.89 for 1939. If the loss incurred in operating the State's Belt Railroad is eliminated, then the net income shown is $283,942.16 for 1940 and $161,416.89 for 1939. But, as the Commission noted (R. I, 32), these sums reflect no deduction for depreciation. And, the record shows that they are not at all available for "replacement of facilities" for they failed even to pay the sinking fund requirements for retirement of bonds—$345,939.33 in each year (R. I, 583, 585–586)—to which they must first be devoted under state law.

It clearly appears from the record that upon any reasonable basis of reckoning depreciation, appellant California's terminal operations at San Francisco are being conducted at a very heavy annual loss. Thus, the Edwards-Differding study (see pp. 13–15, *supra*) included an analysis of the service lives of the various kinds of terminal property, which showed a maximum estimate of

50 years for buildings and structures, based on the most durable construction, and a maximum of 10 years for dock equipment (Ex. 61, R. II, 945–948). Accordingly, on the straight-line method of depreciation accounting, which appellant California adopted when it last calculated depreciation in 1929 (R. I, 580–581), the minimum annual rate of depreciation would be 2% for buildings and structures, wharves and sheds, and 10% for equipment. Application of these annual rates to the recorded values shown on appellant's balance sheet for these types of properties (see Ex. 135, R. II, 1257), as of June 30, 1939 and 1940, discloses annual depreciation accruals, to be provided from revenues, of $1,135,003 and $1,132,426 for buildings and structures, in 1939 and 1940, respectively, and of $88,780 and $88,686, respectively, for equipment. Adding these figures to the deficiencies for annual redemption of bonds, the amounts by which annual revenues fall short of annual costs incurred in the terminal operations at San Francisco in 1939 and 1940 were $1,405,634 and $1,285,786, respectively.[55]

Thus California's "general data" indicated the utter inadequacy of its over-all terminal revenues to meet costs of operation, and the unit cost studies revealed that demurrage and storage charges were far below cost in the case of each terminal for which such studies were available.

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[55] All of the foregoing figures are exclusive of the investment in the Belt Railroad operated in connection with the terminal properties.

Accordingly, in the case of California as well as that of Oakland, the Commission was clearly entitled to infer from the evidence that the demurrage charges were non-compensatory (cf. *O'Keefe* v. *United States*, 240 U. S. 294, 303; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 305–307).[36] Moreover, the failure of both to come forward with any evidence that the charges were compensatory, after the Commission's urgent concern with the sufficiency of existing charges to meet costs had been plainly shown both by the Commission's direct evidence and the statements of Commission counsel at the hearing (R. 582, 604), likewise tends to support the Commission's conclusion. Cf. *Interstate Circuit* v. *United States*, 306 U. S. 208, 226; *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 51–53. As substantial evidence supports them, the findings should be upheld. *Swayne & Hoyt, Ltd.* v. *United States, supra*, at pp. 304, 307.

IV

OAKLAND'S LEASES WITH HOWARD AND THE McCORMICK STEAMSHIP COMPANY WERE PROPERLY HELD SUBJECT TO SECTION 15 OF THE ACT

Without arguing that its leases to Howard and the McCormick Steamship Company are exempt

[36] The adequacy of the cost studies is a question of fact for the Commission, in the decision of which evidence of the costs of each terminal operator affected is not necessary. See *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 480–481, 484.

from Section 15 of the Act,[57] Oakland suggests that the Court should not "lightly" hold those leases subject to the Commission's approval, because of possible conflict between local and federal requirements (Br. Oakland 107–109). However, not only has Oakland failed to point out any conflict which has so far materialized because of the Commission's ruling that the leases must be submitted for its approval, but should such conflict ever eventuate, it is clear that the federal regulation must control. *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 440–442; *Moore* v. *Bay*, 284 U. S. 4.[58]

CONCLUSION

For the foregoing reasons, the judgments should be affirmed.

Respectfully submitted.

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[57] The leases in question are clearly covered by Section 15 as the Commission properly ruled (R. I, 19–20).

[58] The fact that the lease with Howard antedates the Act is of course immaterial. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 482; *DeLaval Co.* v. *United States*, 284 U. S. 61, 73, 74.

APPENDIX

The Shipping Act of 1916, as amended (39 Stat. 728, 46 U. S. C. 801 *et seq.*), provides in part as follows:

Section 1 (46 U. S. C. 801):

When used in this Act:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States."

Section 15 (46 U. S. C. 814):

Every common carrier by water, or other person subject to this Act, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or appor-

tioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16 (46 U. S. C. 815):

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to

any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Section 17 (46 U. S. C. 816):

no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or

collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 18 (46 U. S. C. 817):

every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the commission and keep open to public inspection, in the form and manner and within the time prescribed by the commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route

and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the commission and after ten days' public notice in the form and manner prescribed by the commission, stating the increase proposed to be made; but the commission for good cause shown may waive such notice.

Whenever the commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Section 29 (46 U. S. C. 828):

in case of violation of any order of the commission, other than an order for the payment of money, the commission, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 31 (46 U. S. C. 830):

That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in

part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

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